AWTAR SINGH PURAN SINGH A

v.

MAJLIS PEGUAM MALAYSIA

HIGH COURT MALAYA, IPOH B
TEO SAY ENG JC
[ORIGINATING MOTION NO: 25NCVC-47-2011]
18 APRIL 2012

LEGAL PROFESSION: *Professional discipline - Reinstatement - Restoration to the roll - Whether applicant fit and proper person to be reinstated - Whether being struck off from rolls for more than five years created an automatic right for reinstatement - Character of applicant - Whether character reference sufficient to show change of character - Whether restitution enough to support reinstatement* C D

LEGAL PROFESSION: *Roll of advocates and solicitors - Restoration - Application for - Whether applicant fit and proper person to be reinstated - Whether being struck off from rolls for more than five years created an automatic right for reinstatement - Character of applicant - Whether character reference sufficient to show change of character - Whether restitution enough to support reinstatement* E

This was an application by one Awtar Singh ('the applicant') to have his name reinstated on the Roll of Advocates and Solicitors by virtue of s. 107 of the Legal Profession Act 1976 ('LPA'). The F Bar Council ('BC') referred two complaints received by one H'ng Chye Jin ('complainant') against the applicant to the Disciplinary Board ('DB'), namely, (i) that the applicant had received taxed costs on 20 December 2000 but failed to release the sum to the complainant even though the agreed fee of RM8,600 had been G paid; and (ii) that the applicant's failure to appear in court had resulted in a matter being struck off. Based on the evidence tendered, the Disciplinary Committee ('DC') recommended that the applicant be struck off the Roles pursuant to s. 103(c)(iii) of the LPA on 25 March 2006. The applicant's application to set H aside the DB's order in the Taiping High Court and the subsequent appeal to the Court of Appeal was dismissed. In the present application, the applicant filed two affidavits which enclosed character references by three practising advocates and solicitors in support of his reinstatement. The BC in turn filed an I affidavit opposing the application for reinstatement. The issues

considered by the court herein were, *inter alia*, (i) whether the applicant was a fit and proper person to be restored to the Roll since he had been struck off for more than five years; (ii) whether the character references filed were sufficient to show that there was a change in the applicant's character; and (iii) whether the restitution by the applicant was enough to support the reinstatement.

Held (dismissing application with costs):

(1) The fact that the applicant was struck off the Rolls for more than five years did not give rise to an automatic right to be reinstated but only a factor to be considered. The pertinent question was whether the applicant had rehabilitated during the interim period. The court found that the three character reference was not sufficient to show that there was a change in the character of the applicant. Furthermore, the facts disclosed in the two affidavits and the applicant's conduct in the court showed that the applicant was not remorseful of his misconduct nor was he fully rehabilitated. (paras 16 & 18)

(2) Despite the fact that the applicant had made the restitution, the court was not satisfied that the likelihood of the applicant in repeating the same offence was negated. The applicant still maintained that what he did was not wrong but a mere technical error. As such, the restitution by the applicant did not support the application for reinstatement as the court gave due regard to public interest and the profession as a whole. (paras 20, 22 & 23)

Case(s) referred to:

Chan Chow Wang v. Malaysian Bar [1986] 1 LNS 94 HC ***(refd)***
Re Ram Kishan [1992] 1 SLR 529 ***(refd)***
Teoh Hooi Leong v. Bar Council [1991] 2 CLJ 1117; [1991] 1 CLJ (Rep) 451 SC ***(refd)***

Legislation referred to:

Legal Profession Act 1976, ss. 103(c)(iii), 103D, 107(1), 130D

For the applicant - Awtar Singh Dr Puran
For the respondent - Babu Raj Gopal; M/s Kean Chye & Sivalingam

Reported by Sandra Malani Gabriel

JUDGMENT

Teo Say Eng JC:

[1] This is an application by originating motion by Awtar Singh a/l Puran Singh, a former advocate and solicitor that his name be reinstated on the Roll of Advocates and Solicitors under s. 107 of the Legal Profession Act 1976 ('LPA 1976').

Background Facts

[2] Mr. Awtar ("applicant") read law at University of London and was called to the Bar on 8 December 1992. Thereafter, he practised law as a Legal Assistant at Messrs Manikam Avadiar & Co from 15 January 1993 to 31 May 1993. Between 14 June 1993 and 31 October 1994, the applicant practised at Messrs Mohd Ismail & Co as a Legal Assistant. The applicant set up a sole proprietorship under the name and style of Messrs A S Saini & Associates on or about 1 November 1994 until closure of the firm on 31 December 2002. He was in possession of his last Practising Certificate for the year 2002.

Background Of Complaints

[3] On 26 October 2001 the Bar Council referred two complaints received from one H'ng Chye Jin ('complainant') (acting on behalf of Jin Plantation Sdn Bhd) against the applicant to the Disciplinary Board. The applicant was subsequently struck off the roll on 25 March 2006.

[4] The applicant was struck off the Roll of Advocates and Solicitors based on two complaints lodged against him with the Disciplinary Board.

First Complaint

(i) Sometime in 1995, the complainant engaged the applicant to handle a civil suit against one Kwan Tung Association ('defendant'). The suit was disposed of on 27 July 1999 and a judgment sum of RM70,383.38 together with costs was awarded in favour of the complainant. Partial payment of RM30,000 was made by the defendant on 16 December 1999 and a writ of seizure was issued against the defendant on 24 December 2000 for the balance sum outstanding amounting to RM43,169.66 ('sum outstanding'). The writ was executed and

consequently the defendant paid the sum outstanding which the complainant acknowledged as being the full and final settlement.

(ii) The applicant was to tax the costs and on 24 October 2000 an allocator was sealed by the court for RM44,737. The applicant received the sum on 20 December 2000 but failed to make remittance of the same to the complainant.

(iii) The agreed professional fees of RM8,600 was fully paid by the complainant to the applicant.

Second Complaint

(i) In May 1999, the complainant engaged the applicant to sue the Director of Land and Mines, Perak and seven others for an order of *mandamus* at the High Court of Taiping.

(ii) The complainant paid RM1000 to the applicant towards fees.

(iii) The complainant was given an impression that the matter was proceeding smoothly.

(iv) On the date of the hearing, the applicant failed to appear in court resulting in the matter being struck off. The court allowed reinstatement subject to the complainant paying the opposing party the sum of RM500 as costs being condition for reinstatement.

(v) The application for reinstatement was handled by a firm of solicitors appointed by the applicant without the knowledge of the complainant.

(vi) Eventually, the complainant discharged the services of the applicant on realising his incompetence and requested the refund of the sum of RM1000, which the applicant refused.

Finding And Recommendations Of The Disciplinary Committee

[5] In respect of the first complaint, it was established that the applicant had received the taxed costs on 20 December 2000 but failed to release the said sum to the complainant. Furthermore, the agreed fee of RM8,600 had been paid by the complainant to the applicant. In respect of the second complaint, the Disciplinary

Committee was of the view that the applicant had no acceptable excuse for his conduct. Based on the evidence tendered before the Disciplinary Committee, it recommended that the applicant be struck off the Roll by virtue of s. 103(c)(iii) LPA 1976. The applicant was struck off from the Advocates and Solicitors Roll on 25 March 2006 by the Disciplinary Board.

[6] The applicant had earlier filed an Originating Motion No. 25-8-2007 in Taiping High Court to set aside the Disciplinary Board's order dated 25 March 2006 made pursuant to s. 103D Legal Profession Act 1976 (LPA 1976).

[7] The High Court of Taiping dismissed applicant's appeal with cost on 24 August 2009.

[8] Thereafter, the Court of Appeal also dismissed the applicant's appeal on 14 February 2011.

[9] The applicant now files an application under s. 107 of LPA 1976 for readmission.

The Law

[10] The application for reinstatement is made under s. 107(1) of the Legal Profession Act 1976 which reads:

(i) The High Court may, if it thinks fair and reasonable, at any time, order the Registrar to restore to the Roll the name of an advocate and solicitor which has been removed from, or struck off, the Roll.

(ii) Any application that the name of an advocate and solicitor restored to the Roll shall be by originating motion supported affidavit, before the High Court.

(iii) Notice of the motion shall be served on the Bar Council which shall be represented at the hearing of the motion and shall place before the court a report which shall include copies of the record of any proceedings as the result of which the name of the advocate and solicitor was removed from, or struck off, the Roll and a statement of any facts which have occurred since the name of the advocate and solicitor was removed from, or struck off, the Roll and which in the opinion of the Bar Council or any member of it are relevant to be considered or to be investigated in connection with the application.

[11] It is clear from the wording of s. 107 that:

(i) the court may at any time order reinstatement if it thinks fair and reasonable, and

(ii) the court must consider the views of the Bar Council.

[12] In exercising its judicial discretion as to whether to reinstate the name of the application to the Roll, the court must consider the following:

(i) The protection of the public and the profession as a whole over and above the interests of the applicant as its primary duty.

(ii) The application of a person who has previously been struck off the Roll for grossly improper conduct must necessarily be subjected to stricter scrutiny than that of a new entrant to the profession who has no adverse record.

(iii) Unless the court is completely satisfied on all the material before it that there is no likelihood that the appellant will repeat the same offence or any other offence of a similar nature in the discharge of his professional duties and that he is now deserving of readmission to an honourable profession the court should not replace his name on the Roll: *Re Ram Kishan* [1992] 1 SLR 529 at p. 533.

The Applicant's Submission

[13] The applicant in support of his application filed two affidavits in encls. 3 and 14 affirmed by himself enclosing, among other things three character references by three practising advocates and solicitors.

The Bar Council's View

[14] The Bar Council had in turn filed an affidavit affirmed by its Honorary Secretary in encl. 9 in opposing the application for reinstatement by the applicant.

[15] The Bar Council is of the view that the following relevant facts must be taken into consideration by the court in hearing an application for reinstatement:

(a) As a matter of public policy a heavy burden should be imposed on an applicant pursuant to s. 107 to satisfy the court that he is a fit and proper person to have his name restored to the Roll.

(b) The applicant has mentioned that he has never committed any error since the inception of his life and is not aware of any objections from fellow members of the Bar towards his reinstatement. The Bar Council failed to receive two references to vouch his credibility as a fit and proper person to be restored to the Roll.

(c) The applicant admitted that he had committed a technical error in retaining the costs due to the complainant.

(d) The Bar Council failed to receive documentary evidence from the applicant that he has made good the monies due and owing to the complainant.

[16] By reason of the above, the Bar Council is of the view that Mr. Awtar Singh s/o Puran Singh has failed to satisfy the burden of proving that he is a fit and proper person to be restored to the Roll and wished to oppose his application as conduct of this nature is too prevalent and must be strongly discouraged.

Issue For Determination

Is The Applicant A Fit And Proper Person To Be Restored To The Roll?

[17] The applicant submits that his name should be restored to the Roll based on the fact that he has been suspended for more than five years. I find that such a submission is without merit as it is clear from the case law that the mere fact that the appellant was struck off for five years and more does not give rise to an automatic right to be reinstated although it may be a factor to be considered: *Re Ram Kishan* [1992] 1 SLR 529. What is more important to be considered here is for the court to focus on the intrinsic character of the applicant that is to say, whether the

applicant has rehabilitated during the interim period. See *Teoh Hooi Leong v. Bar Council* [1991] 2 CLJ 1117; [1991] 1 CLJ (Rep) 451; [1991] 2 MLJ 190. The onus is on the applicant to show:

(i) There has been such a change in his character as to make him a fit and proper person to resume practice at the Bar.

(ii) He is truly penitent, and

(iii) He has made restitution: see *Chan Chow Wang v. Malaysian Bar* [1986] 1 LNS 94; [1986] 2 MLJ 159.

[18] In the present case, the appellant has produced three character references, the first testifying, among other things that the applicant has lived a morally blameless life since he was struck off the Roll and the other two merely stating that the applicant is a fit and proper person to be restored to the Roll.

[19] Although the three character references were not controverted by the respondent I find that they by themselves are not sufficient to show that there was a change in the character of the applicant. In fact from the facts disclosed in his two affidavits and by his conduct in conducting the application in court, I find that the applicant was never remorseful at all for what he had done.

[20] Firstly, he refused to accept the decision made by the Disciplinary Board and then filed an originating motion to the Taiping High Court to set aside the Disciplinary Board's order made under s. 130D of the Legal Profession Act 1976. He then appealed to the Court of Appeal when his appeal was dismissed by the Taiping High Court. However his appeal to the Court of Appeal was finally dismissed on 14 February 2011.

[21] Secondly, he still maintained that his refusal to release the party and party costs is a mere technical error despite the fact that the Court of Appeal had dismissed his appeal against the decision of the Taiping High Court in refusing to set aside the Disciplinary Board's order. I do not see any sense of remorsefulness of the applicant on his misconduct.

[22] On the issue of restitution, the applicant was trying to justify that he was no longer required to return the party and party costs to the complainant as he was trying to rely on (i) that he has obtained an allocator against the company of which the complainant was a director for the amount of RM52430.9 after

the bill of costs between solicitor and client in GS22-4-96 which has been taxed on 18 October 2002 and (ii) the claim of the company of which the plaintiff was a Director in Civil Suit 22-29-2003 for the return of the taxed costs which had been struck off whilst his counterclaim for libel in the suit against the complainant was allowed on 24 October 2005 with damages assessed at RM100,000 on 25 July 2008 and there was no appeal against the decision. Since the facts constituting restitution adduced by the applicant were not controverted, I accept that the applicant is deemed to have made the restitution.

Decision

[23] Despite the fact that the applicant has made the restitution, I find that from the materials which are before me he has not demonstrated through his conduct and actions during the interim period that he has fully rehabilitated and is now a fit and proper person to be restored to the Roll. I am not completely satisfied that there will be no likelihood that the applicant will repeat the same offence in future as he still maintains until the date of the hearing of this application that what he did is not wrong but a mere technical error.

[24] Having considered all the facts and circumstances of this case, I am of the view that in the interest of the public and the profession as a whole, this application should not be allowed and accordingly is dismissed with costs.